2725

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TWIN FALLS-SALMON RIVER LAND AND WATER COMPANY, a corporation, SALMON RIVER CANAL COMPANY, LIMITED, a corporation, COMMONWEALTH TRUST COMPANY OF PITTSBURG, Trustee, and A. C. ROBINSON, Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. POND, JAMES W. BEAUCHAMP, CARL WASHBURN and HAROLD M. SIMS, in their own behalf and in behalf of all persons similarly situated with them, Appellees.

BRIEF OF APPELLEES

SAMUEL H. HAYS,
Solicitor for Appellant, Twin Falls-Salmon River Land and Water Company.

J. H. RICHARDS,
O. O. HAGA,
Solicitors for Appellants, Commonwealth Trust Co. and A. C. Robinson.

PASCO B. CARTER,
Solicitor for Appellant, Salmon River Canal Co.

C. O. LONGLEY,
E. A. WALTERS,
Solicitors for Appellees.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TWIN FALLS-SALMON RIVER LAND AND WATER COMPANY, a corporation, SALMON RIVER CANAL COMPANY, LIMITED, a corporation, COMMONWEALTH TRUST COMPANY OF PITTSBURG, Trustee, and A. C. ROBINSON, Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. POND, JAMES W. BEAUCHAMP, CARL WASHBURN and HAROLD M. SIMS, in their own behalf and in behalf of all persons similarly situated with them, Appellees.

BRIEF OF APPELLEES

STATEMENT OF THE CASE.

We feel warranted in making a further statement of the case, in view of the statement appearing in the brief of the Land and Water Company, and will attempt to support our statement by reference to the record.

The action is one brought by certain settlers upon what is known in Southern Idaho as the Salmon River Carey Act Project, and is maintained not only for the plaintiffs named in the bill, but for and on behalf and for the benefit of all settlers and water contract holders upon said tract (par. 34. p. 36); these settlers have individual holdings upon said project, evidenced by what are called settlers' contracts with the Land and Water Company for a water right for the irrigation of their respective holdings (par. 10, p. 13).

It is the claim of these contract holders (Carey Act entrymen) that in entering into a contract with the Land and Water Company, hereinafter called the Company, they purchased of such Company and agreed to pay $40.00 per acre for a water right for each acre of the land entered by them as well as for a proportionate interest in the irrigation system to be constructed for the conservation and distribution of the water so purchased (par. 10, p. 54, State Contract).

It is the further claim of the settlers that in violation of the express terms of the State Contract, which, by reference, became a part of the settlers' contract, the Company has sold water rights for lands far in "excess of the appropriation of water therefor" (1st par. on p. 52), and that by reason of such fact, the Company is unable to comply with the terms of its contract and cannot furnish or deliver the water right purchased (par. 17, p. 20).

The settlers are refusing to pay the instalments due under the terms of the contract, and for relief ask that the Company and its successors be enjoined from collecting such instalments until the water right sold is delivered; further asking that a receiver be appointed to take charge of the project, and reduce the area thereof so that those who can be supplied with water from the amount available may pay, and such portion of the money so paid as shall be necessary, be used to reimburse those whose investments upon the lands will be lost by the failure of the Company to supply water under the contracts.

It is the further claim of the settlers that the Land and Water Company is insolvent and there is no other water available than the flow of Salmon Falls creek.

The Land and Water Company, as a party defendant, as we understand its claim, contends that it did not agree to sell any water right; but only a proportionate interest in an irrigation system to be represented by shares of stock in a company, known as the Canal Company, and to it would be trans-

ferred what the Land and Water Company had acquired in the way of a water right as well as all works of diversion.

That having constructed a dam and various canals for purposes of distribution, and the dam being entirely efficient for the purpose of conserving all the water in the creek, and the canals and laterals adequate for the distribution of such water, the Company has fully performed its contract and is entitled to collect the amounts due under such contracts regardless of the question of water supply.

The Company also issued bonds, to secure the payment of which it assigned as collateral the settlers' contracts to one of the appellants, A. C. Robinson, and also executed a trust deed upon all of its interest in the system to the appellant Trust Company, as trustee. This trust deed embraces all of the property rights of every kind owned by the Company as security for the payment of the bonds, and it further appears that the Company has defaulted in the payment of the interest due thereon (131).

It further appears that both the trustee and Robinson are residents of the State of Pennsylvania, are attempting to collect the moneys claimed to be due under the water contracts and have instituted foreclosure proceedings for such purpose in the District Court of the United States for Idaho (190).

The other appellant to the action, the Canal Company, is but a nominal party to the action, and is solely under the control of the Land and Water Company.

The cause was tried before the Court, and, following a memorandum decision (279-307), an interlocutory decree was entered, here set forth in full, in which counsel for appellants have, for some reason, treated as final:

INTERLOCUTORY DECREE.

> "That the defendant Twin Falls Salmon River Land & Water Company contracted with the State of Idaho and with the settlers holding agreements for the purchase and

sale of water rights that it, the said defendant, would provide a system of canals and reservoirs on what is known as the Salmon River Project, in Twin Falls County, State of Idaho, which in ordinary seasons would furnish a supply of water for irrigation purposes sufficient for the acreage covered by such settlers' agreements at the rate of two and three-fourths acre feet per acre, measured at the points of delivery from the system into the consumers' laterals; and further that it would not sell rights in excess of such available supply. That the said defendant be restrained from making additional contracts for the sale of water rights and also from waiving the right to forfeit any existing contract. That the said defendant and the Commonwealth Trust Company of Pittsburgh, a corporation, Trustee, and A. C. Robinson, be, and each of them is, hereby enjoined and restrained from collecting or attempting to collect, or from enforcing payments upon said water right agreements, including any overdue payments or installments on said agreements, until such time as the holders thereof have been provided with the water supply so contracted for, or are given trustworthy assurance, to be approved by the court, that said water will be provided, or until the further order of this court.

"It is further ordered and decreed that jurisdiction be retained for the purpose of making final disposition of the cause, and leave is hereby granted to either party to make application at any time for the introduction of further proof touching the available water supply, and more particularly relating to (1) the amount and dignity of the rights awarded to adverse claimants in the suit of Twin Falls Salmon River Land & Water Company, et al., v. Vineyard Land & Stock Company, now pending in this Court, and numbered 405; (2) seepage in the reservoir basin and the canal system; and (3) the aggregate amount of water agreements actually outstanding at the time of such application, and upon the submission of such proof for the entry of final decree.

"Dated this 29th day of November, 1915."

ISSUES.

The controlling and practically the only question presented

to the Court below was as to the construction and meaning of the contracts between the parties. The only disputed question of fact presented by the record is as to the run-off of "Salmon Falls Creek," as it is called by the U. S. Geological Survey (173). The figures of the Geological Survey give the stream an average yearly run-off of 127,000 acre feet (179), while the Company measurements disclose a yearly average of 130,295 acre feet (192).

It was agreed upon the trial that all contract holders upon the project held under contracts identical as to terms and provisions, and that all contract holders are similarly situated as to their rights under the contract (128-129); that no patents have issued from the United States for any of the Carey Act lands (130).

It is further stipulated and agreed that the Land and Water Company had never delivered to any of the contract holders, pursuant to the terms of the settlers' contracts, water to the extent of one-half inch per acre continuous flow from the 1st day of April to the 1st day of November of each irrigation season (133).

The evidence taken upon the trial further discloses that the water first began to run in the reservoir and be conserved the latter part of the year 1910, but did not become available for diversion into the canal system until April, 1911; that there are no available records as to the acreage in crop in 1911 or the amount of water delivered for that year; but that in 1912 the total acreage in crop was 16,310 acres; in 1913, there were 23,403 acres in crop and in 1914 a total of 30,064 acres in crop; that on the first day of October, 1912, after the distribution of water to the settlers had been discontinued there remained in the reservoir 43,550 acre feet and there had been delivered that year to the settlers—measured at the settlers weir—29,350 acre feet As the only source of information that could be had was from the records of the Company, these records were employed for the purpose of showing all facts

pertaining to the conservation and distribution of water. It further appears from the records of the Company that the run-off for the year 1912, was 154,000 acre feet; the transmission loss, 50 per cent of the water turned out of the reservoir gate, and that the reservoir loss for that year was 64,181 acre feet—this loss made up of percolation or seepage and evaporation loss. It should be observed in connection with the foregoing, that the run-off of the river, as given, is taken from the Geographical Survey records rather than from the Company record, which was 169,888 acre feet.

An analysis of the figures for the year 1912, discloses that after deducting the reservoir loss from the 169,888 acre feet run-off left in the reservoir, 105,707 acre feet were available for distribution; deducting from this 50 per cent for transmission loss, left 52,852 acre feet, measured at the farmers' weir, or water for 25.8 days, at the rate of one-half inch per acre continuous flow, or about 20 per cent of two and three-fourths (2¾) acre feet, which would be the equivalent of 6.6 inches for the season.

The foregoing would be on the assumption that all of the water contracts sold and outstanding, and embracing 73,000 acres, were receiving water.

Taking the Company records again for the year 1913, it appears that the annual run-off was 108,405 acre feet, the reservoir loss 46,314 acre feet, leaving 62,091 acre feet for distribution at the mouth of the reservoir; transmission loss for that year was 33 per cent, making 20,697 acre feet lost in transit to the farmers' weir. This would make available at such point 41,394 acre feet, or water for the entire 73,000 acres for 20.6 days at one-half inch per acre continuous flow, or five (5) inches of water for the season, being 15 per cent of two and three-fourths (2¾) acre feet.

For the year 1914, the Company records show a run-off of 135,295 acre feet; a reservoir loss of 38,032 acre feet, leaving for distribution 97,263 acre feet; the transmission loss for that

year was 27.3 per cent, making a total loss in transit of 26,558 acre feet, which would deliver at the farmers' weir 70,705 acre feet, or water for 35.15 days at one-half inch per acre continuous flow, or 8.45 inches for the season.

The average of the three years would be 54,981 acre feet, and giving each water user two and three-fourths (2¾) acre feet at his weir, would irrigate 18,535 acres out of the 73,000 acres sold.

From the foregoing figures, and giving the settler two and three-fourths (2¾) acre feet of water for the season, 15,600 acres could have been irrigated in 1912; 10950 acres in 1913 and 18,688 acres in 1914, so that with only 30,000 acres of the total sold in cultivation in the year 1914, there was an excess of acreage over the water supply to the extent of something over 12,000 acres.

It should be further noted that according to the figures of the Company for the year 1912, the 16,000 acres in crop received 1.8 acre feet; in 1913 after the largest run-off the river has ever disclosed, according to the data available, the 23 403 acres in crop received 2.14 acre feet, and in 1914 with 30,000 acres in crop, the farmers received 2.46 acre feet.

It further appears from the record that the Company refused to deliver any specific amount for the season and refused to recognize the right of the water user either to receive the two and three-fourths (2¾) acre feet contended for by the settler, or the one-half inch continuous flow from April 1st to November 1st, or its equivalent as specified in the contract (139).

It further appears that demands were made by the settlers during each of the years 1912, 1913 and 1914, and while they were not always in the form of a demand for two and three-fourths (2¾) acre feet, but were sometimes for the delivery of a continuous flow of one-half inch per acre from April 1st to November 1st, the demands were always refused and have not been complied with in any case, and this, irrespective of the amount of water stored in the reservoir (140).

It further appears from the testimony of the Chief Engineer of the Company, that starting with the water supply on hand, as fixed by the witness at 25,000 acre feet in the reservoir on April 1st, 1915, and supplying the entire 73,000 acers sold with one-half inch per acre continuous flow, and assuming the reservoir received the same flow for the year 1915 as for 1914, the water supply would last for about 15 days, when the reservoir would be exhausted (142).

It further appears from the testimony of one of the witnesses for the plaintiff, and also a settler upon the project, that he had not tendered performance thereof with reference to the payment of instalments because of the statement given the witness by different officers of the Company that he did not purchase a water right, but had merely purchased a proportionate interest in an irrigation system which was absolutely worthless to him without the water, so he refused to make payments (146); that he was ready, willing and able to comply with his contract if he received the water specified therein; that he had been advised at different times that he could not have more water when he asked for it, and that is the extent of the advice he received from the Water Company relative to water deliveries (146).

The same witness produced plaintiffs' Exhibit 17 purporting to be a circular issued over the signature of the Twin Falls Salmon River Land and Water Company, W. S. Kuhn, President (155), and in which the reader was advised that 80,000 acres of the Salmon River Project had been opened for entry on June 8, 1908, and 70,000 acres of the land filed upon during that month, and further advised that the tract affords "water supply of the best and in abundance" (147).

The circular proceeds to advise how lands and water rights are secured (148), and that the price of the water right and land on the Salmon Project is fixed by the State Land Board at $40.00 for the water right and 50c per acre for the land, and that the first payment on the water right is $3 25,

and then follows the terms of the instalment payments upon the water right (149). This circular under the head of "Water Supply" advises the reader that "the water supply for the Twin Falls Salmon River Project is obtained from the Salmon River, which has a vast drainage area in the Cassia National Forest Reserve. **The water right is perfect**, and there is no land susceptible of irrigation above the Salmon district, and **no water rights in contest**.. It carries water sufficient for the irrigation of more than 150,000 acres in normal years, and as a rule the spring run-off is far greater than the amount of water required for the irrigation of this amount of land for the full season" (152).

The witness testified that he saw and read these advertisements prior to the time he took, by assignment, the contracts issued by the Company, and relied upon the statements contained in the circulars issued by the Company, and to the effect that the State of Idaho guaranteed to protect the settlers in these matters, and also in a general way, upon the amount of land to be reclaimed and upon the sufficiency of the water right (156).

QUESTIONS PRESENTED FOR REVIEW.

For the purpose of analysis, we divide the questions to be presented for review by the appellate Court under two heads: First, as to how far the appellate Court will go in considering the facts and law in reviewing the appeal from an interlocutory order in this case; and second, the construction of the contract between the parties.

The appeal in this case having been taken from an interlocutory order, by which the Lower Court has restrained the defendant company, and its successors in interest from the collection of any of the instalments claimed to be due under the water contracts until the final order and decree of the Court, and the well recognized rule being that the appellate Court will not disturb an interlocutory order, granting an in-

junction unless the Trial Court has clearly abused its discretion, presents the first question in this case.

Southern Pacific Company vs. Earl, 82 Fed. 690.

As it is the rule that "the granting of a preliminary injunction in the exercise of the judicial discretion of the Circuit Court will not be set aside on appeal unless it clearly appears that the Court erred in applying the legal principles which should have guided it when considered from the Circuit Court standpoint." If such rule is applicable and controlling to the appeal in this case, our inquiry will cease if the question proposed be determined favorable to the appellee.

Massey vs. Buck, 128 Fed. 27.

The appellant in this case has treated the interlocutory order as final and on the theory that the appellate Court will be required to consider the questions raised in the Court below.

In order to properly pass upon the first question here suggested, we will of necessity refer to the contract existing between the parties, as the construction of this contract will be one of the fundamental and controlling questions in the case.

ARGUMENT.

Taking up the first question proposed, we find the following authorities, in point: "The Circuit Court of Appeals will not disturb an interlocutory order granting an injunction where the questions of the law or fact to be ultimately determined are difficult, and injury to the moving party will be immediate, certain and great, if the relief is denied, while the loss to the opposing party will be comparatively small if it is granted."

Dimick vs. Shaw, 94 Fed., 266.

In connection with the foregoing rule, we wish to call the attention of the Court to the undoubted fact that if it be the final order of the Lower Court in this case, that the appellant has the right to collect these contracts, and this without regard

to the question of whether any delivery of the water right sold has been made, the interlocutory order in this case does not deprive the defendant of one penny of the money due under such contract; so that there can be no material injury to the appellants because of the order.

On the other hand, if the appellants are permitted to enforce the payments claimed to be due under these contracts, and the money is paid and taken by the trustee to the State of Pennsylvania and out of the jurisdiction of the Trial Court, and it should then be ultimately held by the final decree of the Court that the holders of these water contracts were entitled to receive the water right purchased, which had not and could not be delivered to all of the contract holders, the purchaser who had been forced to make such payment for something he had not received, would be placed in a very different position, and one involving certain loss and injury to him, from that occupied by the appellants under the interlocutory order of the Court.

"An interlocutory order granting a preliminary injunction will not be reversed on appeal unless it appears from the record that the injunction was improvidently granted"

Hammond Electric Company vs. Board of Trade, 143 Fed. 292.

"The granting of a preliminary injunction in the exercise of the judicial discretion of the Circuit Court will not be set aside on appeal unless it clearly appears that the Court erred in applying the legal principles which should have guided it when considered from the Circuit Court's standpoint."

Massie vs. Buck, 128 Fed 27.

"An order granting a preliminary injunction restraining the removal out of the jurisdiction of the Court all property on which complainant claims a lien, will not be disturbed by an appellate Court when such removal might work irreparable injury to complainant, and the continuance of the

injunction can not seriously harm the defendants, unless it is entirely clear from the record that there is no equity in the bill."

Korum vs. Ingersoll, 133 Fed. 226.

In the Korum case supra, Circuit Court of Appeals held: First, "This case is practically ready for final hearing upon its merits"; and second, "the vacating of the present order might result in irreparable injury to the appellee. while its continuance works comparatively little harm to the defendants. The whole object of the injunction is simply to prevent the transfer beyond the jurisdiction of this Court, pending the hearing upon the merits, of a fund on which the appellant claims to have a lien. In other words, the sole effect of the injunction is that matters remain in statu quo."

If the settlers in the case at bar are correct in believing they purchased something which must be delivered to them before they can be required to pay the purchase price, and as the evidence clearly shows that water contracts have been sold far in excess of the water supply, and assume that it should become incumbent upon the settlers themselves, in the protection of their interests and investments upon this project, to so reduce the area of the project as to enable those instrumental in reducing this area to receive substantially the water right contracted for, would not such settlers have the right to first look to and rely upon the moneys to be paid by them under their water contracts as a fund for the purpose of accomplishing the result suggested?

It is obvious that if the appellants are entitled to enforce the collection of the instalments of purchase price according to the time of their maturity under the contracts, and these collections are sent to the trustee and by him applied to the payment of interest in default and principal due upon the bonds of the construction company, such a condition "might work irreparable injury to complainant" and leave the contract holders practically without remedy.

Decisions of the Circuit Court of Appeals fully sustaining the foregoing rules are as follows:

> "**Encyclopaedia Company vs. Association, 130 Fed. 460.**
> **Dimeck vs. Shaw, 94 Fed. 266.**
> **Southern Pacific Company vs. Earl, 82 Fed. 690.**"

"Where an interlocutory injunction is merely subsidiary to other relief, an appeal to the Circuit Court of Appeals presents only the question whether, conceding such other relief to have been proper, injunction was a proper remedy"

Const. Co. vs. Young, 59 Fed. 721.

"On an appeal to the Circuit Court of Appeals from an interlocutory order granting an injunction, the right of complainant to other relief demanded by his bill can not be considered when it has not been passed upon by the Court below: and the only question before the appellate Court is the propriety of the injunction."

Hart vs. Buckner, 54 Fed. 925.

The brief summary of the evidence heretofore presented will show that no attempt has been made by the Company to deliver any specific water right to the purchasers of these water contracts; and in addition to this, such portion of the record as we have incorporated herein, will show that the Company has never recognized or conceded that it sold any specific water right to the contract holders. This of necessity calls for some consideration of the contracts involved, and we will review to some extent the Federal laws pertaining to "Carey Act" matters, the laws of the State of Idaho pursuant to which these contracts were made, and the contracts themselves, for the purpose of ascertaining what rights the purchasers of these contracts have acquired.

STATUTES INVOLVED.

The acts of Congress under which the lands in question were ceded by the United States to the State of Idaho are: Act

August 18, 1894, c. 301, Sec. 4, 28 Stat. 422 (U. S. Comp. St. 1901, page 1554); Act June 11th, 1896, c. 420, Sec. 1, 29 Stat. 413 (U. S. Comp. St. 1901, page 1556); and Act March 3rd, 1901, c. 853, Sec. 3, 31 Stat. 1118 (U. S. Comp. St. 1901, page 1557), which merely extends the time for reclamation by the State.

The substance of the Congressional enactments is that to aid the public land States in the reclamation of desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior was authorized, upon proper application of a State, to contract with it to donate and patent to the State not exceeding one million acres in each State as the State may cause to be irrigated, reclaimed and occupied. Before the application of the State is allowed, or any contract made for the ultimate reclamation of the lands, or any segregation of the lands from the public domain is ordered, the State was required to file a map of the lands proposed to be irrigated, with a plan showing the mode thereof, and evidence that such plan was sufficient to thoroughly irrigate and reclaim said land preparatory to the raising of ordinary agricultural crops, and also showing the source of the water supply to be used for irrigation. The State so contracting is authorized to make all necessary contracts to cause the lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of the Act; the State being prohibited to lease any of said lands or to use or dispose of them in any way except to secure their reclamation, cultivation and settlement. A lien is authorized by the State and by no other authority on and against the separate legal sub-divisions of the lands so to be reclaimed for the actual cost and necessary expense of reclamation and reasonable interest thereon; and, when **an ample supply of water** is furnished to reclaim a particular tract or tracts, the patent should issue to the State for the same, without regard to settlement or cultivation. Section four of the Act of August 18, 1894, contains the provision that "as fast

as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior that any of said lands are irrigated, reclaimed and occupied by actual settlers, patent shall be issued to the State or its assigns for said land so reclaimed and settled ''

The State of Idaho accepted the terms and conditions of the Federal enactment, commonly known as the ''Carey Act'' and the provisions of the Idaho laws pertinent to the question are as follows:

Section 1613 accepts the conditions of Section 4 of the Act of Congress, together with the grants of land to the State under the provisions of said Act, and vests the selection, management and disposition of said lands in the State Board of Land Commissioners, designated hereinafter as the ''Board.''

Section 1615 provides that any person or incorporated company, constructing or having constructed ditches, canals or other irrigation works to reclaim such lands, shall file with the Board a request for the selection on behalf of the State by the Board of the land sought to be reclaimed, which request shall be accompanied by a proposal to construct the irrigation works necessary for the **complete reclamation** of the lands to be selected, and the proposal to be prepared in accordance with the rules of the Board and the regulations of the Department of the Interior; the proposal shall also be accompanied by a certificate of the State Engineer that application for permit to appropriate water has been filed in his office, together with the State Engineer's report thereon; the proposal shall also state the source of the water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which **perpetual water rights will be sold to settlers**, said perpetual water right to embrace a proportionate interest in the canal or other irrigation works, together with the rights and franchises attached thereto.

Section 1616 provides that the Board shall have the authority to prescribe that each proposal shall be accompanied by a

certified check to be held as a guaranty of the execution of a contract with the State.

Section 1617 provides that the person or company making application shall file with the State Engineer an application for a permit to appropriate water for the reclamation of the lands prescribed, and such application to be accompanied by maps of the land selected for the proposed irrigation works and to be prepared in accordance with the regulations prescribed by the State Engineer and the rules of the Department of the Interior.

Section 1618 provides for the examination of the proposal by the Registrar of the Board to see that it is in form, and if so, it shall then be submitted to the State Engineer, who shall examine the same and make a written report to the Board as to whether the proposed works are feasible; whether the proposed diversion of the public waters of the State will prove beneficial to the public interest; whether there is **sufficient unappropriated water** in the source of supply; and further provides that whenever the State Engineer shall be unable from the data available to determine either or any of the questions prescribed for his determination and report, it shall be his duty to make or cause to be made, such survey or examination as will enable him to report intelligently thereon to the Board.

Section 1619 provides for the approval of the proposal by the Board, on the express condition that the report of the State Engineer shall be favorable; but expressly provides that no approval or acceptance of any proposal shall be made in case the State Engineer reports adversely, either as to the water supply, the feasibility of construction, the cost or capacity of the works, or as to the character of the land sought to be irrigated.

Section 1621 provides that upon the withdrawal of the land by the Department of the Interior, it shall be the duty of the Board to enter into a contract with the party submitting the

proposal, and that such contract shall contain complete specifications of the location, dimensions, character and estimated cost of the proposed ditch, canal or other irrigation works, the terms per acre at which such works and **perpetual water rights** shall be sold to settlers, and the price and terms upon which the State is to dispose of the lands to settlers; this contract not to be entered into, however, by the State until the withdrawal of the lands by the Department of the Interior and the filing of a satisfactory bond on the part of the proposed contractor in a penal sum equal to five per cent of the estimated cost of the works and which bond shall be conditioned for the faithful performance of the provisions of the contract with the State.

Sectin 1622 provides as to the time within which the works must be completed, giving five years for the construction of the works.

Section 1623 provides that the contract may be forfeited for the contractor's default, in the method indicated by such provision.

Section 1625 provides for the publication of notice of opening of segregation for sale and entry, and that such publication must contain the price for which said land will be sold to settlers by the State, and the contract price at which settlers can **purchase perpetual water rights**.

Section 1626 prescribes the qualifications of such settlers and requires the application of the settler must be accompanied by a certified copy of a contract for a **perpetual water right**, made and entered into by the party making application with the person, company or association who has been authorized by the Board to furnish water for the reclamation of said lands; and the Board shall thereupon file in its office the application and papers relating thereto, and, if allowed, issue a certificate of location to the applicant, the Board to dispose of all lands accepted by the State at a uniform price of fifty cents per acre.

Section 1628 provides for the proof of reclamation by the settlers and the section further provides that when the works designed for the irrigation of lands under the provisions of the chapter shall be so far completed as to actually furnish "**an ample supply of water in a substantial ditch,**" the State of Idaho shall make proof of such fact and shall apply for a patent to such lands in the manner provided in the regulations of the Department of the Interior.

Section 1629 provides that the water rights shall attach to and become appurtenant to the land as soon as title passes from the United States to the State, and that the Construction Company furnishing the water for the land shall have a first and prior lien on said water right and land for all deferred payments for said water right; that such lien shall be a prior lien and may be foreclosed as by said section provided.

The contract with the State was executed on April 30, 1908, and the opening for entry for holders of water right agreements of 80,000 acres of land was held on or about June 1 1908. It should be kept in mind that no one could apply to enter lands under the provisions of the Acts, either State or Federal, unless they held a settlers' contract with the Company for the purchase of a water right.

Passing upon the relative situation of the parties before the settlers' contract was executed, as observed in the memorandum decision of the Trial Court: "In the first place, it is highly improbable that settlers would have signed a contract by which they must obligate themselves to pay at the rate of $40.00 per acre for the mere chance of sharing with an indefinite number of others in a projected irrigation system, concerning the capacity and efficiency of which they could, in the nature of things, have but little information."

The Construction Company, pursuant to the laws of the State, first makes the application for the segregation of the lands and submits a proposal as to how these lands are to be reclaimed. One of the essential elements of this proposal is

a showing as to how the lands are to be irrigated; the source of water supply, and that there is sufficient unappropriated water in the source of supply to warrant the acceptance of such proposal by the State.

All of these vital facts are determined prior to the execution of the contract between the State and the Construction Company, and the settler has of necessity no knowledge or information concerning them, except that he undeniably has the right to assume that the State officials will faithfully perform their duty and that all of the matters called for by the statutes of the State will be carefully and scrupulously attended to by such State officials. As we understand it, one of the principal points of argument contended for by the appellant in this case is predicated upon the theory, or reasoning, that the State, having permitted the contract for the reclamation of 150,000 acres of land to be entered into and that there then proving to be insufficient water to irrigate and reclaim such area, the settler who holds such water contract can make no complaint. This would place a premium upon the inefficiency or corruption of State officials and permit the adventurer in enterprises of this kind to make any sort of a proposal to a State, which, if accepted, and regardless of the question of performance, could be enforced as against the settlers who relied upon the provisions of the law adopted for their protection. In practically all of the Carey Act projects, not only the State contract is entered into prior to the work of construction upon the project, but the settler's contract as well, and, aside from his said contract, the settler has no knowledge or means of knowledge as to just what the result of the work, or as to what the performance of the Construction Company will be under the contract with the State; and of course this is especially true in projects involving the storage and conservation of the waters in streams as distinguished from projects diverting the flow of a river or creek.

The settler, in fact, has no "means of determining whether a proposed reservoir will hold water or whether the water shed

is sufficient to fill it; these are matters peculiarly for the Company to investigate. Can it for a moment be supposed that even the most susceptible could be induced to sign contracts if they were informed that the Company would give no promise of a sufficient supply; no assurance of any sufficient quantity; no undertaking that any given amount would be available for the project as a whole; and no guaranteed limit upon the number of acres for which water rights would be sold?" (Memo. Dec., p. 283.)

Upon the other hand, under our State law, the Construction Company is bound to take out a permit for sufficient water to irrigate and reclaim the land, taking this permit in its own name and not in the name of the settlers whose property it will thereafter become; and if it be contended that the Company has no interest in nor agreement to sell a water right of a specific amount, why should it file upon water in any specific quantity or make any filing upon water at all?

From the circular heretofore referred to, it appears that the Kuhn interests, which were responsible for the building of this project, were well satisfied and had full confidence in the adequacy of the water supply, as the prospective settlers were therein advised that the "water supply is of the best and in abundance"; that "the water supply is obtained from the Salmon River, which has a vast drainage area in the Cassia National Forest Reserve; the water right is perfect and there is no land susceptible of irrigation above the Salmon tract, and no water rights in contest. It carries water sufficient for the irrigation of more than 150,000 acres in normal years, and as a rule the spring run-off is far greater than the amount of water required for the irrigation of this amount of land for the full season."

As observed by the Trial Court in its memorandum decision, "It will thus be seen that no doubt was entertained of an abundance of water, and if it was confident of a supply sufficient in normal years for 150,000 acres, there is no apparent

reason why it should not, for the purpose of selling rights for 80,000 acres, make its contract attractive by incorporating therein an undertaking to furnish a comparatively small specific amount; with such a margin of safety, there could be no substantial risk."

Reference is made by counsel for appellant to this circular, and some effort made to discredit the same as not being a Kuhn publication, by claiming at this time that the circular was issued by someone other than the defendant company, and for which the defendant company is in no wise responsible. There was no objection, however, predicated upon such grounds or upon any ground of which we are advised to the introduction of plaintiff's Exhibit No. 17, being the circular in question. The reasonable inference is, therefore, that the Company proceeded in this matter either with the belief that it could conserve sufficient water to furnish the settlers with a specific amount, or with such reckless disregard of the facts as to justify and require the same conclusion. Not only this, but the express provisions of Section 1615 of the Revised Codes of Idaho require the Construction Company to include within its proposal to the State, for the construction of the works, the statement as to "the price and terms per acre at which **perpetual water rights** will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto."

Now, if no specific water right was sold, and the settler is only entitled to receive a proportionate interest in what the company may be able to conserve, can it be said that a "perpetual water right" was sold? "Perpetual" has been legally defined as something which is to last without limitation as to time. If appellants mean that the perpetual right sold is the right to receive what water might be available for delivery—that is, when sufficient water was conserved to distribute, the contract holders should receive it, and when there was an in-

sufficient supply the contract holders should go without, the word "perpetual" evidently applies to the needs and necessities of the Company rather than to the right of the settler to any specific thing or amount of water.

The Trial Court was called upon to construe the contracts in suit, and the result of such analysis appears in the memorandum decision of the Court, and is such a clear, precise and logical construction of those contracts that we take the liberty as well as distinct advantage of incorporating a considerable portion herein:

"Now as to the contracts themselves. A printed form was prepared by the Company and offered to the public, which is the form held by the plaintiffs and all other settlers. This recites the incorporation of the Company, its execution of the State contract, the commencement of construction work, notice from the State Land Board that it (the Company) might proceed to sell or contract rights to the use of water, and thereupon it is agreed that in consideration of the payment of a certain amount of money, and the covenants on the part of the settler, the settler 'shall become entitled to..... shares of the stock of the Salmon River Canal Company, Limited, the certificate thereof to be in the form as follows:

".....Shares. .....190...

"This is to certify..... ..is the owner of.....shares of the capital stock of the Salmon River Canal Company, Limited.

"This certificate entitles the owner thereof to receive one-hundredth of a cubic foot of water per acre per second of time for the following described land:.....

..... in accordance with the terms of the contract between the State of Idaho and the Twin Falls Salmon River Land and Water Company, and this certificate also entitles the owner to a proportionate interest in the dam, canal, water rights and all other rights and franchises

of the Twin Falls Salmon River Land and Water Company, based upon the number of shares finally sold in accordance with the said contract between the said Company and the State of Idaho.

SALMON RIVER CANAL COMPANY, LIMITED,

By....., President.

Attest:....., Secretary.

"Then follows a clause dedicating the water right to the land described, and to none other. There are numerous other provisions touching the manner and times for paying the purchase price and maintenance charges, the temporary operation of the system, and other subjects not relevant to the present inquiry. The irrigation season is defined to be from April 1st to November 1st of each year. Certain other clauses which may be deemed to be pertinent, are as follows: 'Said certificate (that is, said certificate of stock) to be delivered as provided for in said State contract and under the conditions therein stated. * * * This agreement is made in accordance with the provisions of said contract between the State of Idaho and the Company, which, together with laws of the State of Idaho under which this agreement is made, shall be regarded as defining the rights of the respective parties, and shall regulate the provisions of the shares of stock to be issued to the purchaser by the Salmon River Canal Company, Limited. * * * This contract is made pursuant to and subject to the contract between the Company and the State of Idaho, and the existing laws of said State."

"The import of the instrument, standing alone, as it would be understood by an intelligent layman with no preconceived notions of its meaning, is not open to debate. It is a contract for the sale of a specific water right of one-hundredth of a second foot per acre for each acre of land described, and as an incident thereto a proportionate interest in the irrigation system. The holder of a certificate of stock, so the contract

reads, is entitled 'to receive one-hundredth of a cubic foot of water per acre,' and 'a proportionate interest in the dam, canal, water rights,' etc. The defendants' contention wholly ignores the first of these co-ordinate clauses, and limits the right granted precisely to the second. But the clauses are neither inconsistent with each other nor identical in meaning, and no reason is apparent why they should not both be given effect. If the suggestion be made that in form the contract provides only for the transfer of the certificate of stock in the Canal Company, and does not in terms convey a water right at all, the answer is that the technical form is quite unimportant. The clear purport of the entire instrument is the sale of the water right, and that is undoubtedly the sense in which the Company expected it would be understood, and in which it was understood by the settler. One of the preliminary recitals is that the State Board had notified the Company that it could proceed to sell, not certificates of stock, but water rights; and paragraph three reads: 'The consideration for the water rights hereby agreed to be conveyed is the sum of $.....'' etc. It will not be assumed that the instrument was cunningly drawn to deceive the unwary, ''to keep the word of promise to the ear and break it to the hope.'

''By itself the settler's contract thus appears to be unequivocal, and we next inquire whether its apparent import is materially qualified by its references to and adoption of the state contract. Doubtless the two instruments must be read together, and in some respects the one is to be deemed the complement of the other. But it is to be borne in mind that the settlers' contracts are subsequent in time to that of the state, and insofar as they clearly and fully express the agreement of the parties upon a given subject they are controlling, provided, of course, they contravene no statute of the state or of the nation. In this connection it is not to be overlooked that the state contract expressly provides that the Company

may at its option contract to sell rights upon terms more favorable than those which it prescribes. But were a different view to be taken, is there anything in the state contract so opposed to the idea of a water right of a definite amount that it must be held to render the granting clause in the settler's contract inoperative? The first paragraph binds the Company to build the system, 'and to sell shares of water right' therein, '**and also** to transfer the ownership,' etc., of the system to the settlers—a general plan entirely in harmony with the settler's contract. By paragraph two the Company is required to supply a reservoir capacity of 180,000 acre feet, and a canal capacity of one-hundredth of a second foot for each acre of land sold. In paragraph four there is an apparent difficulty, not, however, strictly in relation to the proposition of a definite water right; a specific amount is suggested which does not appear to correspond with that called for by the settler's contract. The paragraph recites that the Company holds a permit for the appropriation of 1500 second feet of the waters of Salmon River, and thereupon the statement is made that it 'has been determined' that the natural flow of the stream, supplemented by a reservoir capacity of 180,000 acre feet, will be sufficient to provide 'two and three-fourths acre feet of water per acre for each acre of land to be irrigated.' Thereupon follows a reiteration of the obligation of the Company to construct canals of a sufficient capacity for one-hundredth of a second foot per acre. Now assuming a continuous flow of one-hundredth of a second foot per acre throughout the entire period from April 1st to November 1st of each year, there is a want of correspondence between two and three-fourths acre feet and one-hundredth of a second foot, for a flow of one-hundredths of a second foot would deliver two and three-fourths acre feet in approximately four and a half months. But it may very well have been understood that while the nominal irrigation season extended from April 1st to November 1st, as a matter of fact

the actual season is much shorter, and in that view the discrepancy is more formal than real.

"In paragraph six it is agreed, upon behalf of the state, that no application to enter land will be approved unless the applicant shall have entered into a contract with the Company 'for the purchase of sufficient shares of water rights' for the irrigation of the land, 'said shares or water rights to be evidenced by the stock of the Salmon River Canal Company.'—language which makes additionally clear the fact that the Company was selling water rights, not merely certificates of stock in another corporation. In the same paragraph is found an agreement that priority of application for water rights, or priority of entry and settlement, shall not confer upon the settler priority of right in the use of water. This stipulation is not to be taken as implying an understanding that water rights might be sold in excess of the normal capacity or serviceability of the system, for it is to be read in connection with another clause in the same paragraph providing 'that to the extent of the capacity of the irrigation works and to **the extent of the water rights to which it is entitled**' the Company shall sell or contract to sell water rights; and the last part of paragraph nine, which expressly prohibits the sale of water rights 'beyond the carrying capacity of the canal, or in excess of the appropriation of water therefor.' This provision against priority of right was doubtless inserted to cover seasons of abnormally low water, and to forestall the claim that might be set up by the earlier settlers that they were entitled to be supplied to the full extent of their rights, to the exclusion of later settlers, at any time when, due to such abnormal conditions or to some casualty, there was insufficient water fully to supply all rights. In that view the several provisions of the contract are in harmony, and all are given effect; whereas, if the defendants' contention be adopted, not only is the express language of the settler's agreement set at naught, but the clauses last above quoted from the state contract are

rendered meaningless. For if the settlers' contracts convey no specific water rights, but only undivided interests in the system, it is manifest that such water right as the Company possesses never could be exhausted or exceeded, for any right, be it large or small, is capable of division into an infinite number of shares.

"In paragraph eight is found the following provision: 'Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-hundredth (1-100) of one (1) cubic foot of water per acre per second of time, and each share or water right sold or contracted to be sold as herein provided shall also represent a proportionate interest in said canal and irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said canal.' Standing alone this language is susceptible to a construction tending to support the defendants' contention; but it may also be read entirely in harmony with the settler's contract. Under the familiar rule that a printed form of agreement will be construed most strongly against the party by whom it is prepared, the doubt here would have to be resolved against the Company, even if we had nothing but the state contract. And why, it is pertinent to ask, should the State have so carefully insisted upon a canal capacity of one-hundredth of a second foot per acre if the water was not to be supplied up to practically that capacity? It would seem to be wanton waste to build a canal twice the size needed. It is futile to say that an additional capacity might have been required for the rotation system of delivery, the possibility of which was contemplated, for, under such a system, the flow in the main canals and laterals is not necessarily variable, the fluctuation or periodic use is only in the sub-laterals and individual ditches.

"In paragraph ten provision is made for the organization by the Company of the Salmon River Canal Company, and the transfer to it of the ownership and control of the system, and

for the issuance to the settlers of a share of stock therein for each acre of land for which a water right is sold. The capital stock of the company, it is stipulated, shall consist of 150,000 shares, 'which amount,' such is the provision, 'is intended to represent one share for each acre of land which may be hereafter irrigated from said canal.' But while thus provision is made for the possible irrigation of 150,000 acres, there is no right or license implied to sell water rights in excess of the available supply of water, whatever that may turn out to be. Plainly the clause is to be read together with the limitation in that respect already discussed.

"It is sought to attach significance to other language found in paragraph ten, to the effect that water is to be delivered for irrigation purposes in such quantities and at such times as the condition of the crops and the weather may determine. By its very terms this provision is made to relate only to the period during which the Company shall have charge of the system, before it passes into the control of the water users. But putting aside that consideration, manifestly the regulation pertains not to the measure of the settler's water right, but only to the method of giving such right its greatest efficiency. Probably never before in Southern Idaho, save in some exceptional case, had water been given so high a duty as one-hundredth of a second foot to the acre. In the early history of the state at least one-fiftieth of a second foot was generally recognized as being necessary, and in more recent years, upon the more expensive projects, the duty was more or less frequently increased to one-eightieth of a second foot. It is reasonable to assume, therefore, that both the officers of the Company and the State Land Board realized the necessity of adopting economical methods for distributing and applying the water, if the allotment of one-hundredth of a second foot was to prove sufficient and satisfactory. Undoubtedly rotation of use is superior to the more primitive method of continuous flow, and therefore the Company was authorized, so long as

it remained in control, to establish such system, and accordingly to deliver the water to which the settler was entitled at such times and in such quantities as would best supply his needs; but in thus providing for an efficient method of delivery no authority was implied to reduce the aggregate amount or volume to which the settler is entitled. Therefore the provision, even if it could be regarded as of continuing force, in no wise tends to qualify the settler's right as the same is defined in his contract.

"Perhaps in greater detail than the reasonable length of a judicial opinion would ordinarily warrant, I have now brought under review all the clauses of the State contract which can be deemed to give even the most remote support to the defendants' contention; and it is submitted that they present no real conflict with the settler's contract. Upon the other hand, we find upon further examination that in its most vital feature the precise language of the latter is expressly authorized by the former, for in paragraph ten of the State contract it is directed that 'the certificate of shares of stock of the Salmon River Canal Company, Limited, shall be made to indicate and define the interests thereby represented in the said system, to-wit: A water right of one-hundredth of a cubic foot per second for each acre of land irrigated, as provided in paragraphs IV. and VIII. of this contract, and a proportionate interest in the said canal and irrigation works, based upon the number of shares ultimately sold therein.' Moreover, by its reference to paragraphs four and eight, this provision illuminates their meaning and brings them clearly into harmony with the settler's contract. It is accordingly concluded that the theory of a sale only of undivided interests is untenable.

"Now shifting their position, the defendants say that if anything more than an undivided interest was sold, it was not a specific amount of water, but only a right to use such quantity from time to time as might be reasonably necessary

to supply the settler's needs. Such presumtively must have been the intention of the parties, so it is argued, for a contract for a definite water right, if not in contravention of the constitution and statutes, is opposed to the policy of the State, in that the only right the individual can acquire in water is the right to apply it to a beneficial use, and inasmuch as needs are always variable and fluctuating, title to a definite or specific quantity of water cannot be granted or acquired. Such plausibility, however, as the reasoning may have is due to a confusion of terms, and a consequent confusion of ideas. It may be conceded that the waters of the State belong to the public, and that the private right which the individual acquires by appropriation or purchase is usufructuary only, and further that at any given time the extent of his reasonable need is the measure of the maximum amount he is entitled for the time being to divert from the stream or to receive and use. But this is not to say that in the exercise of ordinary prudence the owner of land may not, by appropriation or contract, provide himself with an available supply which shall be subject to his demand at all times when he has need therefor. Were the defendants' contention to prevail, the existing uncertainty and unstability of titles to water rights would give place to utter chaos. If, for the reasons counsel advance, it was incompetent for the settler to contract for a specific right, it was equally incompetent for the Company by appropriation to acquire any specific or definite right. Water decrees adjudicating the extent of appropriators' rights would be of no effect, and that which the defendants are urging here, namely, a determination of the duty of water, would be an idle thing, for what the farmer needs this year for the proper irrigation of his crops may be too much or too little for the coming year. A contract for a specific amount no more warrants or encourages wasteful use than does a judicial decree or State Engineer's permit. The possibility that the settler may not at all times be able to use the maximum of his available right,

whether such right be acquired by appropriation or by contract, is without significance. That is only to say that, in that event, and for the time being, the water becomes subject to use by others having inferior rights. I know of no consideration of public policy opposed to the exercise by farmers of that degree of prudence which is expected of men in other vocations in providing a margin of safety to cover contingencies. What would be thought of a hydro-electric company furnishing light and traction facilities to an urban community, if it relied upon a power installation just sufficient to meet the needs of the community in normal years, without any margin of safety to cover the contingency of low water or of casualties known to be incident to such an enterprise? If the settler's right is barely sufficient for his needs in the ordinary years and in the absence of mishaps, manifestly he must suffer loss when the run-off falls below the average, or when, through accidents to the system, there is partial or temporary loss of the use of water, or when, because of light precipitation and other weather conditions, the need of water is unusually large. Ordinarily for the farmer not to make provision against such contingencies would be counted against him for carelessness. So far as I am aware, it has never been held or contended that in making an appropriation of water from a natural stream the appropriator is limited in the right he can acquire to his minimum needs, and no reason is apparent why one who contrats to receive water from another should be limited to such needs. Conservation of water is a wise public policy, but so also is the conservation of the energy and well-being of him who uses it. Economy of use is not synonymous with minimum use. Better four prosperous farmers than five who are unsuccessful because of the uncertainty in the water supply, and better four farms uniformly fruitful than five upon which failure is ever imminent, and to which it is bound to come on the average one year in five.

"Now if the contract is lawful, and if therefore the Company could and did contract for the sale of specific rights, and

if such rights were not to be sold in excess of the water supply, what is the quantative measure, if any, provided by the contracts for such rights? We have seen that the sale was of 'one-hundredth of a second foot' to the acre, and ordinarily, it is to be conceded, if this phrase were used with reference alone to a water right in the natural flow of a stream, it would be accepted as a sufficiently clear and complete description in itself. It would impart a right in the owner at any time he had need, and so long as he had need, to divert and use a stream of the magnitude thus described. The question of the quantity of water, in cubical measure, would rarely arise, for no one would be interested in calling it up. But here the outstanding feature of this system is the reservoir, and obviously in estimating the acreage capacity of a reservoir we must not only have the size of the stream to be delivered per acre, but also the length of time it is to run. Upon this point of time, it must be conceded, the contracts taken together are not wholly free from ambiguity. If we dismiss, as I think we may, without discussion, the idea that either party has the power to determine the period to suit himself, there are left three possible alternatives. We may couple the one-hundredth of a second foot with the duration of what is designated as the irrigation season, that is, from April 1st to November 1st of each year, and conclude that the settler is entitled to receive a total quantity of water equal to continuous flow at the rate of one-hundredth of a second foot per acre for the entire season, which would amount to approximately four and one-fifth acre feet. In this view the settler who uses no water during the months of April and May could double the supply to which he would ordinarily be entitled during the months of June and July. While the language of the contracts is susceptible to such a construction, it is doubtful whether at the time they were executed any water rights had ever been so defined in this section of the country, and it is wholly improbable that either party contemplated such a radical departure in irrigation practice.

"A second view is that we may reject the period of the irrigation season as not having anything to do with the question of the quantity of water, but only as establishing the limits of time beyond which no water could be furnished, and adopt the theory that one-hundredth of a second foot was to be delivered during this period at such times only as the settler's need required, without the right on his part to hoard or save for the future by failing to use continuously, and hence without the right at any time to demand a flow in excess of one-hundredth of a second foot per acre. Such a right would be closely analogous to that of one who, as an original appropriator, is decreed at the rate of one-hundredth of a second foot per acre of the natural flow of the stream; he would have the right to divert that amount continuously up to the limit of the beneficial use to which he could apply it, but he could not, by refraining from use today, divert twice the amount tomorrow. The difficulty about this view is that it fails to take account of the necessity of measuring the reservoir, and hence leaves hopelessly uncertain one factor essential to the computation of the required capacity of the system as a whole. But not only here is that one of the vital questions, but it is reasonable to suppose that the parties had it more or less definitely in mind when they entered into the contracts.

"A third view, and one which in many respects is identical with the one just discussed, but which covers the point last noticed, is that a right was contemplated sufficient to enable the settler to receive water at the rate of one-hundredth of a second foot per acre continuously during the season of actual irrigation needs, the amount of which the parties estimated and understood to be two and three-fourths acre feet; and this view I am inclined to adopt. It is not at variance with any of the terms of the contract, it gives a measure of effect to all, and is in conformity with current and general irrigation practice in the State, with reference to which it may be assumed the parties contracted, and furthermore entails no

unreasonable results. The parties doubtless understood that while it is provided that water could be demanded at any time between April 1st and November 1st, demands in April and October would be exceptional, and in May and September generally very light and that it was therefore reasonable to assume that on the average a resource of two and three-fourths acre feet would be sufficient to supply the settler's right of a continuous flow during the irrigation period, of one-hundredth of a second foot per acre. Practically, therefore, and in effect, the provision in the State contract with regard to the two and three-fourths acre feet is not inconsistent with or a limitation upon the definition of the settler's right embraced in his contract, namely, a right to receive one-hundredth of a second foot during the season of his need for water; it is merely the expressed understanding of the parties touching the total amount of water the Company must have available in order safely to provide for this need and thus to comply with its contract. In effect it amounts to an agreement by the Company that it will make provision for that quantity, and an agreement upon the part of the State and the settler that such provision will be accepted as full compliance with the obligation to supply the settler up to the limit of his needs at the rate of one-hundredth of a second foot per acre during the entire irrigation season from April 1st to November 1st. In this way upon the one hand the right of the settler is defined, and upon the other the duty of the Company is made clear and specific. The latter could not legitimately sell water that it did not have, and when at the rate of two and three-fourths acre feet per acre it had sold up to the available supply in its reservoir, as supplemented by the natural flow of the stream during the irrigation season, it was bound to stop.

"There is no force to the argument by which the defendants attempt to array against this view the provisions of paragraph ten of the state contract, authorizing rotation of use, and delivery 'in such quantities and at such times as the condition

of the crops and the weather may determine.' Note has already been made of the fact that these provisions are temporary only, and are in terms limited to the brief period of the Company's control and administration of the system, and the whole argument might properly be dismissed with the suggestion that we are led into confusion rather than into clarity of reasoning by doing violence to the language of the contract and arbitrarily assuming that these provisions are upon the same footing with others of a permanent character. But if for the sake of the argument we join with the defendants in indulging this unwarranted assumption, the general conclusion here reached is in no wise affected. It is plain that the two classes, the one providing for one-hundredth of a second foot per acre, and the other for 'such quantities * * * as the condition of the crops and weather may determine,' if relating to the same subject matter, cannot stand together; one is constant and the other variable, and plainly as measures of a single right or duty they are inconsistent. The one must be understood to pertain to the extent of the right and the other to the method of delivery. But how can we say that the settler's right is the right to receive such amounts of water and at such times during the irrigation season as the condition of his crops may require, and at the same time say that the water is to be delivered to him at the rate of one-hundredth of a second foot per acre? That would be a contradiction of terms. Upon the other hand, to say that the right is to receive water at the rates of one-hundredth of a second foot per acre, flowing continuously during the actual irrigation season, the amount thereof being estimated at two and three-fourths acre feet, and that this amount be delivered from time to time in such quantities as the conditions require, is to define the right and to prescribe a method of delivery involving no contradictions or inconsistencies, and no departure from the best irrigation practice. As already noted, this latter view is the only one under which these clauses in paragraph ten, treated as permanent provisions,

can be given effect without rendering inoperative other clauses of the contract, and in this view they are in no wise opposed to the theory of a definite and specific water right. It is scarcely necessary to add that if the view I have taken of the meaning of the contracts is correct, the duty of water, when applied in accordance with principles which are coming to have the sanction of scientific experimentation, is an immaterial inquiry. The rights of the parties are defined by their written agreements, and even if upon investigation we should find, in harmony with the popular view, that one-hundredth of a second foot is quite inadequate, no relief upon that account could be granted to the plaintiffs. So upon the other hand, and for like reasons, a finding that the settler could get along with something less than that amount would not furnish ground upon which to relieve the defendant company from its contractual obligations. Whatever may be the proper duty of water, we cannot make a new agreement for the parties. If the right granted is too great, and the settler attempts to use water wastefully, that is a matter of which the State and other appropriators upon the stream may complain; it is no concern of the defendants. The terms of the agreement were fixed by the Company, not by the settler; presumably the latter was induced to obligate himself to pay the price in the expectation that he would get the promised water service. It may be assumed that at the time the contracts were negotiated the Company deemed it impracticable to adopt a higher duty for water, and thought that few would be willing to undertake to reclaim the land, and in many cases to risk their all, without the assurance of at least the supply agreed upon. They are entitled to receive what they contracted for. It is to be borne in mind that the evidence touching the duty of water was not offered for the purpose of illuminating the meaning of the writings. Possibly knowledge of what at the time they were executed was generally understood to be a reasonable amount of water for irrigation needs might be of some assistance in determining the meaning the parties attached to the phrase-

ology employed, but manifestly the present views of scientific experts and skilled specialists cannot be considered for that purpose, and in that view the evidence was excluded from present consideration.

"To summarize, the contract, as I have construed it, runs counter to no provision of the constitution, no statute, and no principle of public policy. The right provided for is no more specific than that defined and established by a judicial decree or by a proceeding before the State Engineer in favor of an original appropriator. The construction no more authorizes or permits wasteful use than does a decree or a State Engineer's permit. It eliminates inconsistencies and gives effect to all the provisions of the agreements. Not only is it in accord with the plain import of the language employed, but it is strongly supported by the surrounding circumstances. As we have seen, the Company had confidence that the stream would supply a sufficient amount for 150,000 acres and it procured a permit sufficient to provide at the rate of one-hundredth of a second foot per acre for that area. At that time water rights were customarily appropriated, decreed, contracted for, and sold, as definite quantities, and with rare, if any, exceptions, the amount deemed to be necessary, both popularly and by the courts, exceeded the amount here provided for. In the light of these circumstances the contract must have appeared to be a reasonable one for the Company to make, and no argument of improbability is available as a ground for qualifying the meaning which the phraseology naturally imports.

"If then the settler is entitled to receive one-hundredth of a second foot or two and three-fourths acre feet per acre, it stands conceded that the Company sold, and has outstanding, contracts very greatly in excess of the capacity of the system. Just what this excess is I do not at the present juncture attempt to determine. Aside from the consideration that the period during which we have accurate information touching the run-off of the water shed is comparatively short, and therefore the data inconclusive, a definite finding upon this point

should await the final determination of claims of other appropriators upon the stream, which are now in the course of adjudication in this court. Prior rights are asserted under these claims, and they are of such magnitude that no reliable computation can be made of the amount of water probably available for this project in normal years, until their status and dignity are determined. It is also highly desirable, if not wholly indispensable, that we have the benefit of further experience and observation touching the amount of seepage which may be permanently expected in both the reservoir and the canals."

CONTENTIONS OF COMPANY.

First, taking up the brief for appellant Land and Water Company, there are certain statements of fact, or assumptions, perhaps, not warranted by the record, more especially the statement regarding the diminished area of the project (p. 7). But if counsel for appellants are correct in their construction of the contract, and in their claim that they have sold no specific water right, what difference can it make as to the area of the project, and why are they desirous of showing a net area of but 57,348 acres?

If our "perpetual" water right guaranteed under the statute is a right to get what we can each year, as distinguished from a right to receive a specific amount, there is no reason, insofar as we are advised,why the Company should not proceed to sell the remainder of the 150,000 acres included in the segregation.

We will here group the various contentions as gathered from brief of appellant, and it will be observed in this connection, th strange position counsel assume by not stating precisely what the Company **did** agree to do under the terms of its contract, rather than what it **did not** agree to do:

1. "It never made any contract calling for the delivery of any of the amounts of water specified in the bill" (p. 10).

2. "It is a construction company only."

3. "The interest of the settlers under the statute is proportionate."

4. "That the existing water supply is entirely sufficient for the irrigation of the project under its diminished area (57,348 acres)."

The last proposition is something not involved in a construction of the contract, but rather a reason urged by appellants why the order of the Court should be set aside.

We will attempt to follow the contentions of appellant as enumerated.

First: Having heretofore set forth the construction of the trial Court upon the contract, we feel there is little to add upon such question. Analysis of this question first asks whether a water right was in fact sold. The statutes of the Federal Government and the State, as well as the plain provisions of the State and Settlers' contract, answer this.

Next, if a water right was sold, was any specific amount sold, and if specific, what amount?

The contention numbered three (3) states the claim of appellant; the settlers upon the other hand, claim a sale of a specific amount. And in this connection we should keep in mind the duty imposed upon the State by the Federal Act to secure for the reclamation of the lands "an ample supply of water," which duty was in turn recognized by the State statute wherein it was to be determined "whether the capacity of the proposed works is adequate to reclaim the land described," (Sec. 1618).

If it be the claim of appellant that the settlers are to reclaim the lands by "capacity," rather than water, there is reason in their contention; but the State contract, presumably in compliance with the provisions of law quoted, provides:

> "that the dam hereinbefore mentioned shall be constructed so as to provide a reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of said stream during the irrigation period, **has been determined to be sufficient** to furnish two and

> three-fourths acre feet of water per acre for each acre of land to be irrigated."

What was the necessity of such "capacity" unless the water to be so conserved was to be delivered in the amount so agreed upon as "sufficient?"

Why the "capacity," unless such storage became necessary to enable the Company to deliver the amount determined "sufficient" and adequate for each acre of land to be irrigated?

Second: There is no question but what the Company was a construction company. It had, however, additional responsibilities. Sec. 1621, Rev. Codes, Idaho, relating to the provisions of the contract which shall be entered into between the State and the Company provides:

> " * * * the price and terms per acre at which such **works** and **perpetual water rights** shall be sold to settler * * * "

Even though it be a construction company does this fact create or constitute an immunity from delivering what it sells? Or prevent the application of the ordinary rules of law as to performance of its obligations and contract? As a construction Company it was to receive a price for "works" and "water right;" can it deliver one and not the other and claim performance? We feel we can safely pass this contention.

Third: "The interest of the settlers (in the water) under the statute is proportionate." Appellant under this contention cites Sec. 1615, Rev. Codes, Idaho, and also refers to the subject at various other places in the brief, which the appellate court will undoubtedly discover. We urge the proposition that the Statute referred to does not bear any such construction. The Statute which relates to the proposal to be submitted by the construction Company says:

> "* * * It shall state the source of the water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which **perpetual water rights** will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a **propor-**

tionate interest in the canal and other irrigation works.'' * * * .''

Also in the settlers' contract (p. 64), the purchaser is entitled ''to receive one-hundredth of a cubic foot of water per acre * * *'' and ''this certificate also entitles the owner to a proportionate interest in the dam, canals, water rights, etc.''

To sustain the contention of appellant under a construction of the statute, the ''proportionate interest in the canals'' must embrace and include the ''water right'' agreed to be sold, instead of vice versa. In other words, this first provision of the statute loses its identity and significance by being merged in the second or additional provision. And the same reasoning applies to the terms of the contract. The agreement that the contract holder shall have the right to receive anything is ignored if not emasculated, and his entire right, as defined by appellant, is a ''proportionate interest in the dam canal, water rights, etc.''

Fourth: Taking up the fourth contention, ''that the existing water supply is entirely sufficient for the irrigation of the project under its diminished area (57,348 acres), and it (the Company) desired to show this fact conclusively.''

In the first place this assumes a fact regarding the area which does not exist. The facts are that not only at the date of trial, but up until the present time the Company has contracts outstanding to the amount of 73,348 acres. And if the rights of appellants under these contracts are what they claim for them, it does not lie within the power of the State or any Court, to abrogate or cancel one of these contracts. It is true that 16,000 or more acres has not been cultivated; but these lands are subject to contest under the State laws

It would seem that this fourth contention of appellant completely exposes the fallacy of the position they assume in this case, not only as to their claim of not having sold a water right in any specific amount, but upon the ''proportionate interest'' theory as well.

If they have sold no water right, upon what theory did they desire to offer proof of having sufficient water to irrigate 57,000 acres?

If they only sold a "proportionate interest" in the system, the settler takes what the system may afford regardless of whether 57,000 acres could be supplied or only 10,000 acres.

And under this head, we wish to enquire by what right and under what atuhority—whether statutory or contractual—has the segregation and the area covered by water contracts been reduced to 57,000 acres? According to claim of appellant the State had determined the sufficiency of the water right for 150,000 acres, and the contract executed by the State and by the Company contemplated such irrigation and reclamation. Now it appears that the company was first limited in its sale of water rights to 80,000 acres and proceeding under such limitation. 73,000 acres have been sold. Now we are told the area has been further diminished to 57,000 acres and that appellant has proof that such area can be irrigated.

How can the area be reduced? Sec. 1628, Rev. Codes, Idaho, provides among other things that within two years from the time the person contracting with the State "shall have notified the settlers under such works that they are prepared to **furnish water** under the terms of their contract with the State," the settler must actually cultivate and reclaim not less than one-eighth of the lands filed upon, and having performed this obligation may go before an officer of the Land Board and "make final proof of reclamation, settlement and occupation, which proof shall embrace **evidence** that he is the owner of shares in the works which entitle him to a **water right** for his entire tract of land sufficient in volume for the complete irrigation and reclamation thereof;" whereupon, if such proof is satisfactory to the United States and the State, patent issues first from the United States to the State, and then from the State to the settler.

Under Sec. 1631, Rev. Codes, the Land Board has the right to make rules suitable to the enforcement of the Act generally,

and among these rules we find authority there given "for the forfeiture of entry by settlers upon failure to comply with provisions of this chapter."

The rules of the Land Board adopted pursuant to the provisions of the section provide for contest of any entry where reclamation has not been made as by law required.

Rule 26, Carey Act. R. and R.

But this does not cancel the water contract, or withdraw the entry from the segregation. It simply takes the entry from the one failing to comply with the law and permits the contestant or another person to re-enter the land and succeed to the rights of the previous entryman under the water contract. It is obvious that this does not in any way reduce the area to be irrigated or cancel any water contract. And in this connection if the Company actually had the water which they have agreed to sell and deliver, and a reduction of the area was attempted, either by the State or otherwise, it is not difficult to determine what position the Company would take and objection make. Now does the fact that they have insufficient water alter the rules, or change the contractual rights of the parties?

Another consideration in this connection: Under the law the entryman was required to make proof under oath that he had a sufficient water right to reclaim and irrigate his entire entry. In view of the record in this case it must have been apparent to the entryman as early as 1912 that there was some question as to the sufficiency of their water right; this doubt was emphasized by the experience of 1913, was made a practical certainty by 1914, and 1915 served to make it absolute.

Were the entrymen of the 16,000 acres then compelled, in the light of the facts, to go upon the lands, make their investments requisite to reclamation, in order to prevent the cancellation of their rights and thereby sustain the financial loss which the others have suffered; and to do these things when they knew they could not make the proof which the law required because they did not have what the law said they must have? If they

were required to make proof of something they knew to be false, and thereby unable to make the reclamation required by law, even though by some method of reasoning their entries might be taken away from them,have their water contracts been cancelled?

So we are curious to have counsel explain the precise method by which their liability to furnish water has been reduced to 57,000 acres.

We might, perhaps, add a fifth contention, because of the specification of error suggested by appellants, to-wit: that the Court should have received evidence regarding the duty of water upon the project. The trial court rejected this proof upon the ground that the contracts covered the point and the parties litigant having agreed in their contract as to what water should be delivered, the testimony offered became immaterial.

It really does not require analysis to determine the correctness of this rule. Imagine the surprise of the contract holder, after having entered into a contract for what he believed to be a specific amount of water, to be brought into court and have his right to receive water determined by the testimony of experts and others as to what the duty of water should be, and as a consequence, what he should receive.

It certainly does not lie within the power of the defendant to make any complaint as to the duty of the water; nor is the State in a position to make complaint as suggested by appellants in their brief. This, for the reason that the State was a party to the original contract, which provided, according to our interpretation, that the settlers should be furnished two and three-fourths acre feet of water.

Appellants further complain that the record does not justify the Court order, because there was no showing that plaintiffs have received an insufficient amount of water and have not been damaged; and conversely, that the defendants were prepared to offer proof as to the duty of water, and that such proof would show that sufficient water was available for the irrigation of 57,000 acres; and that, upon this theory, plaintiffs

not having shown injury or damage—the order restraining the defendants for collecting moneys claimed to be due was improperly granted.

But the question as to whether water in sufficient quantities was or could be delivered, is not the only test. The record does sustain the fact, as we believe, that plaintiffs purchased a sufficient water right; that water contracts were outstanding for something in excess of 73,000 acres; that all of such contract holders had the right to receive the water specified therein; that the area under cultivation upon the tract might increase year by year until the full amount of 73,000 acres was brought under cultivation and the owners of such land were claiming the right to receive the water under their contracts. The question then was as to whether, in view of what the record disclosed might and could happen, the entryman should be compelled to pay or continue paying the purchase price for a water right which it was manifest they could not receive? This was the irremediable damage and wrong complained of.

If the contention of the Company is correct, it has the right to enforce the payments as they mature under the contract in the face of the obvious fact that the water purchased cannot be delivered, and yet say that there is no wrong of which the settlers can complain. We believe no stronger showing could be made justifying the interposition of a Court of equity and requiring such Court to restrain the collection of the purchase price for something not delivered, which can not be delivered, and which the Company had refused to deliver.

STATE DECISIONS.

Insofar as the state decisions are concerned, and upon which counsel rely, we wish briefly to refer to the cases mentioned, and more especially to the case of State vs. Twin Falls Canal Company, 21 Idaho, 410; and in this connection we wish particularly to call the Court's attention to the dissenting opinion of Chief Justice Stewart, which fully sets forth the facts and issues involved.

The action was one for a Writ of Mandate brought in the Supreme Court of the State to compel the Canal Company to issue water stock upon lands lying within the segregation, although the action was brought in the name of the State as plaintiff. The plaintiff in the action, in substance, set forth the contract between the State and the Construction Company, claimed that water had been filed upon for the irrigation of the entire segregation, including the lands for which shares were asked, and the fact that the water was sufficient for the irrigation of all such lands, and that the full water right, as evidenced by shares of stock in the Canal Company had not been disposed of.

The Canal Company answered these allegations, admitted that the full number of shares had not been issued and specifically denied that there was any water available for use under the shares sought to be secured by the Writ, alleging as an affirmative defense, that there was no water available to supply the land which such stock would represent, and that all of the water rights in the system had been sold. The dissenting opinion then goes on to state "In the face of this denial, the majority opinion holds that this denial presents no issues whatever, and that the defendant is not entitled to a hearing thereon, and the opinion holds that there is surplus water unsold and that stock representing shares of water may be sold and directs that additional water rights be sold to the plaintiff for the lands by him purchased." Thereby resolving the issue so presented in favor of the State.

The majority opinion, notwithstanding the clear cut issue presented by the pleadings, held that there was no necessity of proof under the issue because the State and Company had determined before the execution of the contract, that 3,000 second feet was ample to irrigate the segregation. In other words, the opinion of the Supreme Court proceeds upon the theory that because the State in passing upon the question preliminary to the entering into the State contract between the State and the

Construction Company, had said that there was sufficient unappropriated water to irrigate all of the lands included within the Twin Falls segregation, therefore, of necessity, and as a matter of right under the contract, the water must be ample for all of the lands and the Canal Company must issue such stock.

The very issue was joined in the West case and presented to the Supreme Court which was presented in the case at bar and which appellants now claim should have required the introduction of evidence, and the determination of the fact as to whether or not there was water which would justify the issuance of the stock as prayed for in the Bill.

The vast difference between the West case and the case at bar becomes apparent when we consider that in that case the Company actually had the 3,000 sec. ft. to deliver which the State and Federal governments had held, and which the State court says they must have held, to be sufficient to irrigate the entire 240,000 acres; while in the case at bar we have only the "capacity" as distinguished from the water; and instead of having a 1500 sec. ft. flow, or a flow sufficient to impound "180,000 acre feet of water, which amount, in addition to the normal flow of the stream during the irrigation period, has been determined to be sufficient to furnish 2.75 acre feet of water per acre," we have about one-fifth of the supply contemplated.

This being true, did either the State or Land Department of the United States pass upon the sufficiency of the water supply as the facts warrant, so that the following language of the West case applies:

> "The Land Department of the United States must have considered those facts before it came to the conclusion that said amount of water was sufficient to reclaim said land. If it had not come to that conclusion, it would not have segregated the land included in said project on the showing made by the State. The State Land Board must have concluded from those facts that the water appropriated was sufficient for the reclamation of said land, or it would not

> have entered into said contract for the construction of said irrigation system. And, further, there is nothing in the record to show that said amount of water is not amply sufficient to properly irrigate all of said land if used in turn by the owners of the land or under a proper system of rotation."

In other words, what facts, as distinguished from what has proven fiction, were considered by the Government or State authorities? What facts of existing physical conditions were considered to the end that such consideration should be binding upon any one?

In the West case, the Court says:

> "The State Land Board must have concluded from those facts that the water appropriated was sufficient for the reclamation of said land, or it would not have entered into said contract for the construction of said irrigation system."

That there is a vast difference between an actual appropriation of 3,000 sec. ft. of water from a stream where it is actually present and susceptible to appropriation, and the filing of an application for a permit to appropriate 1500 sec. ft. of water which does not exist, no one better than this Company can vouch for.

And the physical fact of such actual appropriation in the West case is the predicate for the decision. Now what the Court actually held in the West case was, that the 3,000 second feet appropriated was determined, by those whose right and duty it was to pass upon the matter, to be sufficient; if by seepage and evaporation losses in delivery a greater amount of land than then represented by water rights sold could not be served by giving to each user the full amount contracted, and having in consideration the facts and circumstances surrounding the parties at the time the contract was made, the Court reasoned that it must have been within the contemplation of the parties that the settlers' should bear such seepage and evaporation loss, because the water appropriated was deemed suf-

ficient to irrigate all the lands, and hence, required the Canal Company to issue the additional stock. Then, too, the appellate court was undoubtedly persuaded that much of the water was picked up by lower users and hence the loss would be nominal rather than substantial. The word "appropriated" as used in the West case means something more than intent.

There is another question we believe material in consideration of the contention of appellants as to the holding in the West case. In that case, as we have found, the water sought to be appropriated was in fact appropriated and diverted into the canals of the Company. The Land Department of the United States having, by segregating the land, agreed that such water should be sufficient to reclaim the same, and has issued patents for said land. But how does the settler upon the Salmon project proceed to secure his patents? We have no water and were not sold any. The water which was supposed to be in the stream was not there. Will the fact of the water not being in the stream be persuasive as a reason for the United States issuing a patent for lands reclaimed under the Carey Act? Is reclamation the test, or is the expectation that the lands would be reclaimed sufficient? Such expectation being predicated upon the representations of unreliable promoters or dishonest or incompetent State officials, or both?

If the West case means what appellants contend, we are forced to the conclusion that the State and Company have agreed that the water available, whatever it may be, shall be sufficient for the irrigation of all the lands included in the segregation; that the Company is only a construction company and has no duty to perform, and hence no liability predicated upon such duty in connection with the water rights or sale thereof, and that the settler receives a proportionate interest in the system, be it one with or without water. There is no place to stop, short of this conclusion, as the question of degree cannot enter into the equation. In other words, the Company has completed its contract according to the reasoning and conten-

tion of appellant, when it has constructed an irrigation system, regardless of results.

But there is another and later Idaho case which may throw some light upon this matter, and is instructive, as the facts in that case and the case at bar are similar in many respects. The case of Childs vs. Neitzel, 26 Idaho, 116, and not referred to by either of the counsel for appellants, insofar as we have been able to discover, holds among other things:

> "1. Where a Company is incorporated for the promotion of an irrigation scheme and to construct an irrigation system consisting of reservoirs, dams and ditches, such corporation enters into contracts with persons having land within such project, to furnish them water at an agreed price per acre, divided into annual payments, with interest on deferred payments, and agrees to complete such system within a certain time and furnish the purchasers of water rights with water, and agrees to turn such system over to such purchasers of water rights after its completion, and thereafter mortgages its interest in such system and water right, and also assigns such water right contracts as security for borrowed money, which money is used in the construction of such system: held, that the person loaning the money only acquires such rights and interest as the irrigation company has in such a project and such water contracts, and cannot collect the payments that become due after the time has expired for the completion of such irrigation system and the delivery of water until the said system is completed and the water delivered in accordance with the terms of the water right contracts."

While this case did not involve a Carey Act Company, so-called, it did involve the construction of contracts similar to the one here in issue, and it will be noted that the Court expressly held that insofar as the original construction Company or the assignee of such Company was concerned, no recovery could be had upon the contracts until the system had been constructed and the water delivered. So that the contractual relations are similar in the two cases and there is a further similarity to be found in the fact that the action was maintained by the person

holding the water contracts of the settlers as security for the payment of a certain bonded indebtedness created by the construction Company.

It was contended by counsel for appellant in that case, as in this, that the corporation was organized solely to provide a system of irrigation of certain lands, and that the "defendant Company was the mere instrument or legal means for providing the lands with water, the cost thereof to be paid by such land owners or purchasers of water under said contracts."

But the Court says:

> "We cannot agree with counsel in that contention. The Murphy Company agreed to complete said irrigation system with its dams, reservoirs and canals and turn the same over to the purchasers of water rights within a specified time, the price per acre for such water rights being stipulated in most of the contracts at $35.00 per acre. The Murphy Company no doubt contemplated making a considerable profit for itself in the construction of said system. It was not an eleemosynary corporation or the trustee or agent of the water right purchaser for the construction of said irrigation system, but was a corporation organized for the purpose of making a profit to its stockholders from the construction of said system. If any profits had arisen to the company from the construction of said system, the purchasers of said water rights could not, under said contracts, share in them with the Murphy company. The Murphy company had employed engineers and experts to examine said irrigation project as to its feasibility, the quantity of water that could be obtained for the irrigation of said land and the cost of the construction of said system to make the water available to the land to be irrigated, and after that was done, an estimate was made of the amount to be charged for each acre water right that would be necessary and sufficient to furnish each purchaser with the amount called for in his water contract, and also was able to construct said system and complete it. Hence the purchasers of water rights under such system had a legal right to depend upon the estimates made by the irrigation company and upon their contracts with it to the effect that the com-

pany would finish and complete the system and furnish the water according to the terms of the contract. They did not purchase under the rule caveat emptor."

The Court further says:

"The purchasers of water rights depended upon their contracts as to what the water rights and said system would cost them, and had they considered that their water rights would cost them more than $35 per acre, they might not have entered into said contracts. It would have been an easy matter to have worded said contracts so as to have required such purchasers to pay the entire cost of said system had that been the intention of the parties. That was clearly not the intention, as the agreement was to pay $35 per acre for the right, and no more. The Murphy company had agreed to turn over to the purchasers of said water rights certain amounts of water with a canal system completed in such a manner as to make it feasible to irrigate said lands, and until that was done neither the Murphy company nor its assigns could enforce the payment of the amounts that were to become due upon said contracts."

The case came up upon re-hearing and we notice that counsel for the appellant here, the Commonwealth Trust Company of Pittsburg, Trustee, and for A. C. Robinson, were of counsel for appellant upon such re-hearing. The original opinion was adhered to and the Court among other things said:

"While the Murphy project is not a Carey Act project, the contracts entered into with the purchasers of water rights are similar in many respects to those entered into by purchasers of water rights under the Carey Act.

"The amendment by Congress to the Carey Act, approved June 11, 1896, (29 Stats. at L., p. 435), clearly authorizes a lien to be created by the state upon such lands as are granted to the state under said act, and when created shall be valid on and against the separate legal subdivisions of the land reclaimed for the actual cost and necessary expenses of reclamation, and a reasonable interest thereon from the date of reclamation until disposed of to the actual settler, and provides as follows: 'And when an ample sup-

ply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such state, without regard to settlement or cultivation.' That provision for a lien contemplates an ample supply of water shall have been actually furnished in a substantial ditch or canal or by artesian wells or reservoirs to reclaim such land in order to create a lien. That is, making water permanently available to the user. Prior to that amendment by Congress to the Carey Act, the legislature of Idaho had enacted a law authorizing and granting a lien on lands and water rights for the cost of reclamation. (See Laws 1895, p. 227; sec. 1629, Rev. Codes.) Said section provides, among other things, that 'Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner or possessor of said land,' etc. The law clearly contemplates that after water has been made permanently available for the irrigation of the land of a water right owner, all deferred payments for such water right shall become a lien on the land and the water right, and such deferred payments may be collected by the owner of such water right contracts in case a court of equity has not directed that such payments must be applied to the completion of the system, and such a case the court may direct all such payments to be made to a receiver appointed by the court to collect the same and complete the system. In case the water contract holders pay the balance due on such contracts, or any part thereof to the receiver, under the order of the trial court, they would be entitled to a credit on their contracts for the amount paid.

"The water contracts in the case at bar make the deferred payments a lien upon the water rights and land; but such liens do not attach until the water has been made permanently available for the reclamation of the land."

The Supreme Court of Idaho having held that the Carey Act contracts were similar to the contract involved in the Childs-Neitzel case, and further, in discussing the amendment of Con-

gress to the Carey Act, uses the language of the Act itself, as follows:

> "and when an ample supply of water is actually furnished in a substantial ditch or canal, * * * then patents shall issue for the same to such state."

What did the Supreme Court mean by holding that an "ample supply" of water must be furnished under these contracts, if the construction of appellant, placed upon the West case, is correct—that is, that the settlers receive but a proportionate interest in what there is to receive, as this proportionate interest might or might not be "ample"?

In the West case, however, the Court held that the State had determined such water supply to the amount of 3,000 sec. ft., to be "ample"; that is, that 3,000 sec. feet actually diverted in that case, had been determined, to be sufficient. Therefore, we say in the case at bar, that had we received the 1500 sec. ft., the amount of water which was determined to be sufficient, our contract would have been performed in this respect, and the "ample supply of water" furnished, which the United States Government requires before patent will issue.

It cannot be said that this "ample supply of water to be furnished" is a matter to be supplied by proof, because all through the West case, the thought runs that this very proof is eliminated because the fact, to which the proof might be addressed, has already been determined by those having authority in the premises, so that we say that the West case, insofar as it affords authority upon the subject, is favorable to the construction placed upon the contract by the trial Court in the case at bar. That this is the holding of the Idaho court in the West case is not only made perfectly clear by the opinion rendered, but is emphasized by the dissenting opinion filed.

The Childs-Neitzel case was referred to with approval in a later case of Smith vs. Construction Company, 27 Idaho, 407, wherein the Court said, quoting from the Childs-Neitzel case:

> "Construction Companies of this kind will not be per-

mitted to do indirectly what they are prohibited from doing directly. They will not be permitted to make contracts with third parties in regard to the construction or completion of an irrigation system whereby the land owners or purchasers of water rights can be deprived of the rights acquired under their water right contracts; for instance, if a company such as the Murphy Company, fails to complete its system and furnish the water as provided in the water right contracts, or if such company should sub-let the conconstruction of its system and fail and neglect to pay such sub-contractor, the sub-contractor would not acquire greater rights as against the water right purchasers than the irrigation company itself had under its contract with the purchasers of water rights, and could not deprive the purchasers of water rights under such system of their rights, or acquire a right by foreclosure of a lien or mortgage for such construction work as would deprive the water right purchasers of their rights under their contracts."

It is to guard against this very claim of right that the present action was brought, and the interlocutory decree entered. It is the claim of appellants in this case, as it was the claim of the assignee of Murphy in the Childs-Neitzel case, that they have the right to collect the moneys due under these contracts regardless of performance; and it can make no difference in the application of the rule of law announced by the Court, whether the non-performance is to be found in the failure to build a dam or reservoirs, or in the fact that there is no water to deliver—the ultimate failure to receive what the settler has contracted for being the same in either case.

The Bennett case, reported in 27 Idaho 643, 150 Pac., 336, referred to in the brief of appellant, has no bearing on the question here presented, except upon one theory; and upon this question, as we believe, it is an authority supporting our position rather than against it.

That was an action brought in the first instance in the Supreme Court by the holder of a tax deed to certain lands upon a Carey Act segregation, and in which the plaintiff asked that the construction company be compelled by mandate to give to

the plaintiff the water right for such lands, upon the theory that such water right having been "dedicated," as plaintiff claimed, to the lands, such rights thereby passed with the lands under the tax deed.

The facts in the case were that the plaintiff had purchased at delinquent tax sale, a certificate embracing certain lands, and that such certificate had ultimately justified and required the issuance of a tax deed from the County to the lands in question. The original entryman of the lands had only paid the initial payment upon his water contract; he had not paid any of the taxes, and hence the sale of the land for delinquent taxes; it was conceded upon the trial that the purchase price for the water right had not been paid the Company, and the sole question was as to whether, by the use of the word "dedication" in the contracts and statute pertaining to Carey Act lands, such water right passed with the sale of the lands under a delinquent tax proceeding.

It was the contention of the Land and Water Comnay in that case, that the water right was the property of the Construction company and that this water right could not be taken away from it under any theory of dedication until it had been paid for, or at least, that it was a property right which it might sell and receive pay for, and which could not be taken away from it without the purchase price being fully paid.

In support of this, we quote from the decision: "It appears from the record that the plaintiff is claiming his right to something he has not paid for. He is claiming a water right that was conditionally sold by the Land and Water Company to his predecessor for $1400.00, for which purchase price he has paid $120, leaving a balance of $1280.00. The Land and Water Company expended a vast amount of money in building a canal system so as to enable it to sell water rights and conduct the water to place of intended use, relying upon such sales for its sole compensation for the cost of construction. To have such water rights taken away from it without compensation would

certainly work a manifest injustice to it, and to require the Land and Water Company to protect its water rights by the expenditure of a large sum of money in the payment of taxes on lands that it has no interest in whatever," would impose a burden which it is not called upon to assume.

From the foregoing, at least two points are considered and determined in the case. First, that the water company is selling water rights for the purpose of receiving remuneration for the construction of the works; and second, that such water rights are the property of the Company until fully paid for.

How then can anyone successfully contend that it is a construction company only, and has no interest in or duty relating to the water rights necessarily involved in a Carey Act project? And does it not follow as a matter of course that to enable it to receive the purchase price for such water rights to be sold, it must deliver the very thing which it has agreed to sell, and from which sale it derives the cost and profit, if any, involved in the enterprise.

Nor do we understand, in view of the express language employed by the Idaho Court, why counsel for appellant should say that "it is settled by these decisions, and the law could not be construed otherwise, that the construction company received no pay for the water," when the water in the final analysis is the only thing in which anyone under a Carey Act project has any interest—the instrumentalities employed to divert the water and convey it to the place of intended use being but a means to an end.

So we say in the case at bar, that it is the water that we are concerned in primarily, not the wonderful dam which has been constructed, nor the canals which have been built to conserve and divert the water to our use, as these matters are of secondary importance, and without the water are of no value. Having the water, we can build and arrange for the means and methods of conservation and diversion, but without the water, we can do nothing toward irrigating or reclaiming the lands we have entered under the Federal or State laws.

Counsel for appellant trustee has discussed in his brief to some extent the memorandum decision of the Trial Court in the case at bar, but we are content to submit that decision to this Court, as we feel that it does not require nor permit any attempt upon our part to elucidate or explain. It speaks for itself, and seems to us especially precise and to the point.

The Circuit Court of Appeals of the Eighth Circuit, in the case of McKinney vs. Big Horn Dev. Co., 167 Fed., 770, has had occasion to pass upon the provisions of the Carey Act and the statutes of the State of Wyoming adopted pursuant thereto, and which are practically the same as the Idaho Statutes; in fact, the Idaho legislation was based upon the Wyoming laws. In this case the Circuit Court fully considered the question of the duties and obligations imposed by the Carey Act and State laws upon the Company contracting with the State.

The Court says:

> "From all of which it is manifest that the scheme and policy of the statute was and is that the person or company contracting to **furnish** the **water supply** should make contract with the settler subject to the supervision and control of the Board of Commissioners (State Land Board), charged with the enforcement of the proviso that the water rates to the settlers shall be reasonable"

In view of this plain construction, how can appellants claim that the "Construction Company receives no pay for the water?"

Again the Circuit Court says:

> "Evidently the statute contemplates that the Board would obtain the necessary information of the contract price at which the settler can purchase **perpetual water rights** from the contractor, and not otherwise"

What does the Circuit Court mean by saying that the contractor sells, and the settler purchases a perpetual water right, if the contractor has no interest in the sale and delivery of a substantial water right to the one paying therefor?

The only other case in the Federal Courts which we have been able to find dealing with Carey Act contracts is the case of the State of Orgeon vs. Three Sisters Irrigation Company, 158 Fed., 346. This case agrees substantially with the construction placed upon the contract in the Wyoming case and holds in addition that an attempt to annul a contract made pursuant to the terms of the Carey Act, presents a Federal question.

Passing now to the question of whether the District Court properly restrained the defendants from collecting or attempting to collect the payments due under these water contracts, until they had furnished the water supply contracted for: It can not be successfully contended by the defendants that a wrong has not been perpetrated by the construction company upon the settlers as it is obvious and it appears clearly by the record in this case that the construction company has sold water rights far in excess of the available supply of water it had at the time of such sale. This clearly constitutes a breach of the contract. A wrong having been committed, we believe it would be an established principle of equity that no wrong may be done without a remedy being afforded. Starting therefore upon the assumption that a wrong has been committed and that equity will not suffer a wrong without affording a remedy, we believe that we are entitled to receive the relief granted by the interlocutory order.

It is proper to suggest that this sale of water rights far in excess of the available supply was not brought about either with the knowledge or consent of the settlers, and it would be a strange rule to adopt to hold that the settler was without a remedy, simply because the construction company could not perform its contractual obligation.

Let us assume that the order here entered should be reversed. Precisely what position are the settlers placed in? It appears that they can not get what has been sold to them; that the purchase price of the very thing covenanted to be sold and delivered is being demanded, and that suits in foreclosure

upon these water contracts are now pending. The settlers have the alternative of paying these demands of the company or refusing to pay, and in the latter event, permit judgments of foreclosure to be entered for the full amount of the purchase price of the water right. Whichever course the settler adopts, whether of paying the instalments as they mature, or permitting the taking of their land, the result is the same—they lose substantially their entire investment. The settlers come into Court with clean hands because they are ready, able and willing to carry out and perform their part of the contract.

Analysis of the facts of the case at bar, not only bring the complainants in this action within the statute (Sec. 4329, Rev. Codes, Idaho) but within the fundamental rule of law giving Equity Courts the inherent power to grant the relief here sought. The fact of having purchased something not delivered and being confronted with a demand for payment in full, which payment, if made, will be taken outside of the jurisdiction of the Court, would seem to justify the order of the Court here made; at least until the Court can ascertain what the contract holders will in fact receive. In other words, it is perfectly obvious from the facts in the record, that if the plaintiffs paid at the present time, the full amount called for in the contract, when they ultimately determine just what they can and will receive under these contracts, an action at law to recover the damage so sustained and admeasured and predicated upon the difference of the value of what they purchased and actually received would be futile and barren of results. This is the position the plaintiffs will be forced to take if the order here made and complained of is vacated. Nor is the construction company in a position to complain because the situation is distinctyl of its own making, and resulting from its violation of the State contract.

Pomeroy on Equity Jurisprudence, volume 5, Section 54, lays down the following rule:

> "The general principles which should govern the Court in the exercise of its discretion have been thus formulated

in a leading case: The plaintiff must show, first, either that he has a clear right to the property itself, or that he has some lien against it; or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim; and secondly, * * * that the property itself or the income arising from it is in danger of loss from neglect, waste, misconduct or insolvency of the defendant."

As a general rule, a Receiver will be appointed for the purpose of protecting the fund, when the complainant has an equitable interest in the subject, and the defendant having possession of the property is wasting it or removing it out of the jurisdiction of the Court.

Vose vs. Reed, 1 Woods, 647 Fed. Cas. No. 17,011;
Lancaster vs. St. Ry. Co., 90 Fed. 129, 133;
Ryder vs. Bateman, 93 Fed. 16.

There is another cogent reason why the Court should have made the order here complained of, in view of the multiplicity of Suits which will follow and as the various individuals holding contracts will attempt to have their rights determined and their damage fixed, it would seem that the Court was justified for the sole purpose of preventing such multiplicity not only in entertaining jurisdiction, but in holding the matter in statu quo until the rights of all the parties involved can be adjusted. This contention is supported by the case of Munsey Gas Company vs. City of Munsey, decided by the Supreme Court of Indiana, reported in 66 N. E. at page 436. In this case an injunction was granted and sustained without any actual damage.

In this case, the Court uses the following language:

"The streets over which it has exclusive power are being used by appellant under a contract with the City that appellant has broken. This would entitle the city to at least nominal damages at law; and its right to restrain the further breach of the contract which amounts to a negative specific enforcement of the contract, can be affirmed on the ground that it will avoid a multiplicity of actions. This is not an independent source or occasion of jurisdiction,

but as laid down by Prof. Pomeroy, where a party is entitled to even legal relief, and there exists between him and a number of others entitled to relief, a common interest, relation or question as against another party that can be determined by one suit, such facts afford a distinct basis for an appeal to equity."

The Court in the course of its opinion also holds:

"A Court of Equity where there is a basis for the assertion of its jurisdiction, will not suffer men to depart from their agreements at pleasure, leaving the party with whom they have contracted, to the mere chance of damages which a jury may give. * * * it is no answer to say that the act complained of will inflict no injury on plaintiff or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be observed as far as he is concerned, or whether he shall permit it to be violated. It is not necessary that he should show that any damage has been done. It being estimated that the acts of the defendant are a violation of the contract entered into by him, the Court will prohibit the plaintiff in the enjoyment of the right which he has purchased."

Kerr's Injunctions in Equity, Page 533;
Markham vs. Todd, 2 J. J. Marsh 364.

In Green vs. Campbell, 55 N. C. 446, the purchaser was held entitled to an injunction against the collection of the purchase money where the vendor in a warranty deed had no title and was a non-resident and had no property in the State where the action was brought.

To summarize, the appellants are appealing to this Court to reverse an order which prevents them from collecting pay for something they claim not to have sold, namely, a water right; but unless they have sold it, the settlers upon the Salmon project have not purchased the only thing which is of any value to them. Both the Federal and the State Statutes require that the entrymen under these projects have a water right; but make no requirement as to methods or means of diversion, except such as may be sufficient to enable them to reclaim their lands.

That their lands may not be reclaimed with an empty reservoir and a canal system goes without saying. And if we have not purchased a water right as a result of our dealings with this Company, we have not secured the one thing made absolutely necessary and essential under the terms of the Federal and State law. The appellants are not in a position, we say, to complain of this order of the Court. They are bound to concede that the contract made by them has been breached, and as the trial Court provides in the interlocutory decree, the appellants should be restrained from attempting to collect for something which they have sold but not delivered until "trustworthy assurance" be given that the water sold will be provided. The appellants apparently object to the obligation they must have assumed under the law. And if they were in fact proceeding in good faith, upon the completion of the system in 1911, they would have made application to the United States for patents for all of the lands which the system could have then reclaimed, thereby testing in the first instance, at least, the question of whether an ample supply of water had been placed in a substantial ditch so that patents would issue from the Government for the lands reclaimed. Or they now would comply with the orders of the Court and furnish the "trustworthy assurance" that their contract would be performed and thereby obviate the necessity of the restraining order insofar as the collection of payments is concerned.

It is the claim of the appellees that all of the equities of the case are with them and that the order of the lower Court should be affirmed.

Respectfully submitted,

C. O. LONGLEY,

E. A. WALTERS,

Solicitors for Appellees.